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RIGHT TO COUNSEL

N.Y. CONST. art. I, § 6:

In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions

U.S. CONST. amend VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defence.

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Taylor¹
(printed Sept. 19, 1996)

Defendant, Robert Taylor, was indicted on one count of murder in the first degree and three counts of murder in the second degree.² Defendant brought this motion contending that the court is obligated to provide him with the assistance of co-counsel upon his request, as guaranteed pursuant to Section 35-b of the Judiciary Law³ as well as the Federal⁴ and New York State⁵ Constitutions.⁶

1. N.Y. L.J., Sept. 19, 1996, at 26.

2. *Id.*

3. N.Y. JUD. LAW § 35-b (2) (McKinney 1996). This provision states in pertinent part:

The appointment of counsel shall be made by the trial court if made prior to the entry of judgment including a sentence of death by the court of appeals With respect to counsel at trial and at a separate sentencing proceeding, the court shall appoint two attorneys, one to be designated as "lead" counsel and the other to be designated as "associate" counsel

Id.

4. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." *Id.*

The County Court, Suffolk County, granted the defendant's motion and ordered the trial court to appoint additional counsel as provided for by the Judiciary Law.⁷

Robert Taylor was arraigned on the indictment for one count of First Degree Murder and three counts of Murder in the Third Degree.⁸ Mr. Taylor was represented by counsel at the arraignment, but maintained that the trial court was required to appoint co-counsel upon his request.⁹ The Suffolk County District Attorney and New York State Attorney General opposed the motion and argued that there is no statutorily granted entitlement to co-counsel when the defendant has already retained an attorney for his defense.¹⁰

The court began its analysis by stating that it is the right of all defendants to be represented by an attorney of their choice as guaranteed by both the United States Constitution and the New York State Constitution.¹¹ In deciding the defendant's federal constitutional claim, the court stated a defendant's decision in choosing an attorney to conduct his defense is to be respected and "that choice should not unnecessarily be obstructed by the court."¹² In *Gideon v. Wainwright*,¹³ the Supreme Court was

5. N.Y. CONST. art. I, § 6. This provision provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel" *Id.*

6. *Taylor*. N.Y. L.J., Sept. 19, 1996, at 26.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *See, e.g.,* U.S. *ex rel.* Maldonado v. Denno, 239 F. Supp. 851, 855 (S.D.N.Y.) (holding that the right of a defendant to conduct his own defense or obtain counsel of his own choosing are fundamental rights that must be protected by the trial judge), *aff'd*, 348 F.2d 12 (2d Cir. 1965); *People v. Gomberg*, 38 N.Y.2d 307, 312, 342 N.E.2d 550, 553, 379 N.Y.S.2d 769, 774 (1975) (holding that the defendant's choice of counsel should not be lightly interfered with by the court); *People v. McLaughlin*, 291 N.Y. 480, 483, 53 N.E.2d 356, 357 (1944) (holding that a defendant's constitutional right to obtain counsel is denied where the defendant is denied reasonable time and opportunity to obtain counsel of his own choice).

12. *United States v. Sheiner*, 410 F.2d 337, 342 (2d Cir. 1969). Appellant was convicted of sale and possession of fraudulent pennies and

confronted with the issue of whether an indigent defendant in state court has a constitutional right to have counsel appointed to him.¹⁴ In *Gideon*, the petitioner appeared before a Florida court on a felony charge and requested that counsel be appointed for him.¹⁵ That court denied his request and petitioner proceeded to conduct his own defense.¹⁶ Petitioner was convicted of a felony under Florida law, was sentenced to five years in prison and appealed to the Supreme Court of the United States, contending that the trial court's refusal to appoint counsel denied him his constitutional rights.¹⁷ The United States Supreme Court held that an indigent defendant who is unable to be represented by an attorney of his or her own choosing must have a competent attorney appointed by the court at the state's expense.¹⁸ However, an indigent defendant does not have an unequivocal right to choose the assigned counsel.¹⁹ The *Gideon* Court overruled the rule established in *Betts*

fraudulent use of the wire and mail service in violation of 18 U.S.C. §§ 1341, 1343. *Id.* at 338. Appellant appealed his conviction arguing that he was unable to enjoy effective assistance of counsel. *Id.* The Second Circuit held that appellant was clearly informed of a potential for a prejudice and he freely continued to assent to his attorney's joint representation of his co-defendant. *Id.* at 342.

13. 372 U.S. 335 (1963).

14. *Id.* at 344.

15. *Id.* at 336-37.

16. *Id.*

17. *Id.*

18. *Id.* at 343. The Supreme Court held that the Sixth Amendment right to assistance of counsel was extended to state courts by virtue of the Fourteenth Amendment. *Id.* at 340. The Court stated:

[W]e [must] restore constitutional principals established to achieve a fair system of justice [I]n our adversary system of criminal justice, any person who is haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to be an obvious truth.

Id. at 344.

19. See *People v. Sawyer*, 57 N.Y.2d 12, 18, 438 N.E.2d 1133, 1136, 453 N.Y.S.2d 418, 421 (1982) (holding that the right to assigned counsel is not equated with the right to choice of assigned counsel absent a showing, for example, of a conflict of interest or professional incompetence); *People v. Rodriguez*, 98 A.D.2d 961, 962-63, 470 N.Y.S.2d 64, 66-67 (1983) (holding

v. *Brady*,²⁰ which held that a refusal to appoint counsel for a defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment.²¹ The *Gideon* Court extended the constitutional right to counsel guaranteed by the Sixth Amendment to the states.²²

that a court may allow participation by a defendant when it appears that the defendant's waiver was competent, intelligent and voluntary).

20. 316 U.S. 455 (1942). In *Betts*, petitioner was indicted for robbery in Maryland and was unable to afford counsel to appear at his arraignment. *Id.* at 457. The Maryland court refused to appoint counsel for Betts as it was not their policy to appoint counsel for indigent defendants in robbery cases. *Id.* Betts waived his right to a jury trial and conducted his own defense. *Id.* Betts was subsequently found guilty and sentenced to prison. *Id.* Betts filed a writ of habeas corpus to the Court of Appeals of Maryland which granted but his relief was denied. *Id.* Petitioner applied to the United States Supreme Court for certiorari alleging that he was deprived of his Due Process rights guaranteed under the Fourteenth Amendment. *Id.* The Court stated:

[I]n the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial In light of this evidence, we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.

Id. at 471-72.

21. *Id.* at 473. The Court went on to state:

The Sixth Amendment of the national Constitution applies only to trials in federal courts. The Due Process Clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in any given case, to deprive a litigant of due process of law in violation of the Fourteenth [Amendment].

Id. at 461-62.

22. *Gideon*, 372 U.S. at 340. The Court rejected the historical data compiled by the *Betts* Court which determined that the right to counsel is "not a fundamental right, essential to a fair trial." *Id.* The Court pointed out that the appointment of counsel for an indigent defendant is a fundamental right and therefore "the Fourteenth Amendment requires the appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court." *Id.*

In response to the Supreme Court's decision in *Gideon*, New York State adopted legislation entitling a defendant to be monetarily reimbursed for private counsel fees in a criminal case.²³ After the passage of the Death Penalty Legislation of 1995, the State Legislature enacted section 35-b of the Judiciary Law which provides that a defendant, faced with the possibility of a death penalty conviction, who is financially unable to obtain adequate representation, shall be entitled to the appointment of counsel by the trial court.²⁴ Problems arise because there is no clear definition in the statute as to the meaning of "adequate representation."

New York State courts have consistently expanded the meaning of "adequate representation" in a capital murder case to include two attorneys.²⁵ However, in this case, the People urged the court to reconsider that expansion and carve out an exception where a defendant has obtained one attorney with sufficient funds.²⁶ Therefore, the People argued that this defendant should not be entitled to a court appointed co-counsel.²⁷

The *Taylor* Court investigated the legislative history behind the law and determined that both public policy and legislative intent required that an indigent defendant be afforded at least two

23. N.Y. COUNTY LAW § 722-b (McKinney 1991). This provision states in pertinent part: "Where a defendant is charged with a crime which may be punishable by death compensation shall not exceed two thousand four hundred dollars where one counsel has been assigned, and shall not exceed three thousand two hundred dollars where two or more counsel have been assigned." *Id.*

24. N.Y. JUD. LAW § 35-b (1) (McKinney Supp. 1996). This section provides in pertinent part: "[I]n every criminal action in which a defendant is charged with murder in the first degree . . . the court shall determine whether the defendant is or has become financially unable to obtain adequate representation." *Id.*

25. *Taylor*, N.Y. L.J., Sept. 19, 1996, at 26. The court stated that "the statute itself fixes the minimum number of attorneys needed to provide 'adequate representation' at two." *Id.*

26. *Id.* (explaining that "[s]hould the court adopt the People's position of strict interpretation there would be a clear conflict between the statute and the defendant's constitutional right to any attorney of his own choosing").

27. *Id.*

attorneys for “adequate representation” in a capital case.²⁸ However, in a case where a defendant has the financial ability to hire only one attorney, that defendant is deemed as lacking “adequate representation.”²⁹ The only remedy left to that defendant is “either to surrender his constitutional right to be represented by an attorney of his choosing or proceed to trial without ‘adequate representation.’”³⁰

The court proceeded to determine whether the word “shall” as used in Judiciary Law section 35-b should be read as merely directory rather than mandatory.³¹ Focusing on the legislative intent behind the statute, the court determined that “shall” was to be construed as directory, thus allowing the court, in its discretion, to appoint one of the two of defendant’s attorneys.³² In this case, the State of New York would not be burdened with the expense of paying for the lead counsel’s attorneys fees.³³ The County Court, Suffolk County, granted the defendant’s motion directing the court to appoint adequate co-counsel in accordance with the provisions of the Judiciary Law and the Federal and New York State Constitution.³⁴

In conclusion, both the Federal and New York State Constitutional protections for assistance of counsel demand that a defendant be entitled to a court-appointed attorney in criminal cases. This constitutional right of adequate representation, however, is not unrestricted. However, in New York, where a defendant has already retained counsel in a capital case, the court will be allowed to appoint co-counsel upon request. However, an indigent defendant does not have the unrestricted right to choose

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* (“The fact that a statute is framed in mandatory words such as ‘shall’ or ‘must’ is of slight, if any, importance on the question whether the act is mandatory or directory”).

32. *Id.* (“In this manner, the defendant receives the statutory ‘adequate representation’; the statute itself is not in conflict with the defendant’s constitutional right and the State is not burdened with the expense of ‘lead counsel.’”).

33. *Id.*

34. *Id.*

the assigned counsel. Under the Federal Constitution, the indigent defendant is entitled to a court appointed attorney who must provide his client with "adequate representation" in death penalty cases. In contrast, the New York State Court of Appeals has expanded the notion of "adequate representation" in capital cases to the appointment by the court of two attorneys pursuant to section 35-b of the Judiciary Law.

